APPEAL NO. 93037

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on December 22, 1992, (hearing officer) presiding. The issues were whether the claimant had sustained an injury to her left wrist arising out of the course and scope of her employment on (date of injury), whether she had reached maximum medical improvement (MMI), and if so, what was her proper impairment rating. The claimant, who is the appellant in this case, requests this panel's review of the hearing officer's determination that she did not sustain an injury to her left wrist within the course and scope of her employment on (date of injury) or at any other time, that she reached MMI on July 13, 1992, and that she has a zero percent whole body impairment rating.

DECISION

We affirm the decision and order of the hearing officer, as modified.

The claimant had been employed since 1987 by Helena Laboratories (employer), in a production capacity. Her job involved making test plates, which entailed operating machinery to pour, cap, clean, overlay, and seal. The claimant stated she had done nothing but overlay for months, but that her employer had begun rotating employees on the job.

Sometime in July of 1991 the claimant reported a problem with her right hand to her employer. On August 23rd, she experienced cramping in her hand after turning a knob, and she went to see (Dr. W), who ordered x-rays and an EMG; he also referred her to (Dr. M), who performed surgery on claimant's right hand on March 18, 1992. The carrier did not contest the compensability of this claim.

The claimant testified that before the surgery she had cramping and numbness in her right hand; she said she also had numbness and tingling in her left hand "for months," but she thought it would go away. Finally she went to an emergency room because of numbness and tingling on her left side and hand which she was afraid was symptomatic of a stroke. When she told the ER doctor she had recently had surgery for carpal tunnel syndrome, he said that was probably what was wrong with her left hand "because normally when you get it in your right, it moves to the left." Claimant returned to Dr. M because she was continuing to have post-surgical problems in her right hand, and on that visit mentioned what she had been told by the ER doctor. She said a subsequent nerve test showed she had bilateral carpal tunnel syndrome. The claimant acknowledged she had not told her employer about any problems with her left hand.

Medical reports in evidence confirm that claimant was treated for problems in her right hand which culminated in the surgery in March. Dr. M addressed her postoperative problems in her right hand in May, but problems with her left hand do not appear to be

documented until June. A Specific and Subsequent Medical Report from Dr. M dated June 5th states, "[t]his patient's EMG shows bilateral carpal tunnel syndrome with improvement on the right side since the EMG study of December 4, 1991 . . . . She still has numbness and tingling in both hands. The left side is a recent development . . ." On July 22nd Dr. M in an unsigned Report of Medical Evaluation stated claimant had reached MMI on July 13th and assigned an impairment rating of zero percent. Dr. M's description of the most recent clinical evaluation summarized only claimant's condition with regard to her right hand. Upon referral from a friend, claimant saw (Dr. E) on September 9th. In a subsequent letter to carrier, Dr. E stated in part, "[b]ased on clinical examination and based on recent EMG tests, this patient presents with a definite recurrence of carpal tunnel on the right . . . . Her left hand does present with median nerve compression problems also. With the evidence of clinical median nerve compression problems, recurrent on the right and clinically diagnosed on the left collaborated with recent EMG findings, my impression and my recommendation for this patient is to have a median nerve epineurectomy for the right hand, or if possible, even a (sic) endoscopic type technique done, definitely for the left hand, an endoscopic carpal

tunnel release with transection carpal ligament is also advised." Claimant stated, however, that she was not able to follow up on her treatment with Dr. E because the carrier would not pay for it.

On October 29th claimant agreed to see carrier's doctor, (Dr. K), who recommended a repeat EMG study. On November 23rd, Dr. K reviewed the most recent study as well as the prior EMGs, and found in part: "the nerve study on 11-20-92 shows complete normal function in the left median and ulnar nerve. The right median and ulnar nerves independently are working normally now . . . . On the basis of my previous examination and this test, I really do not have an explanation for her symptoms." Dr. K suggested that claimant return to her regular work activities and "see how things evolve."

Claimant also was seen by (Dr. H), a designated doctor appointed by the Texas Workers' Compensation Commission. Dr. H completed a Form TWCC-69 in which he certified MMI as of July 13, 1992, with zero percent whole body impairment.

The hearing officer found that the claimant did not have carpal tunnel syndrome in her left wrist, and that she did not sustain an injury within the course and scope of her employment with regard to that wrist. In her request for review, the claimant said she did not find out about her left wrist until May 29th, and that thereafter Dr. M told her he would notify her employer. She said she believed the safety person at her job should have called her in to fill out an accident report after the employer received Dr. M's report. She also said her latest EMG, done December 17th, shows she has bilateral carpal tunnel syndrome.

In determining whether claimant had sustained an injury to her left wrist in the course and scope of her employment, the hearing officer considered and weighed the medical evidence and chose to find the more probative Dr. K's diagnosis of no bilateral carpal tunnel syndrome, based upon the recent, repeat nerve conduction studies that doctor had ordered, rather than the diagnosis of Drs. M and E. Any subsequent test or diagnoses, such as the EMG mentioned in claimant's appeal, are not in the record of this case and cannot be considered. (We observe that the hearing officer could have chosen to leave the record of the hearing open for receipt of the results of the EMG which the claimant testified had been performed the week before the hearing; however, her failure to do so was not error.) It is the hearing officer's responsibility to resolve conflicts and inconsistencies in the evidence, including those within the medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. Civ. App.-Houston [14th Dist.] 1984, no writ). We will not set aside the hearing officer's decision unless it is so weak or against the great weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

We would observe that the issue as framed in this case was whether the claimant suffered an injury to her left wrist in the course and scope of her employment on (date of

injury), which was the date of injury for claimant's right wrist. This issue did not include the issue of whether claimant suffered a left wrist injury unrelated to her prior injury of August 23rd. Resolution of that issue, should it arise, would of course require the claimant to prove by a preponderance of evidence that such an injury arose out of and in the course and scope of her employment, and that she either timely reported same to her employer or had good cause for failure to timely report, or that her employer had actual knowledge thereof. *See* Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992 (upholding the hearing officer's determination that the claimant's elbow problems were unrelated to her prior carpal tunnel syndrome, and that good cause existed for her failure to give timely notice of injury.) Because of the limited way in which this issue was framed, however, it was error for the hearing officer to hold that claimant herein did not sustain a compensable injury to her left wrist on (date of injury), "or at any other time." We therefore modify the hearing officer's decision and order to strike this language, while affirming her determination that claimant suffered no compensable injury on August 23rd.

On the issue of MMI, the hearing officer determined that the report of the designated doctor, Dr. H, had not been overcome by the great weight of contrary medical evidence, and that accordingly the claimant reached MMI on July 13, 1992 with a zero percent whole body impairment rating. In her appeal, the claimant says that Dr. H did not follow the 1989 Act, Article 8308-4.24, in that he used the incorrect version of the American Medical Association's Guides to the Evaluation of Permanent Impairment. She also contends that Dr. M, who also found she had reached MMI, did not perform any tests on her hands, as Drs. E and H had done.

While the 1989 Act, Article 8308-4.24, requires that all determinations of impairment must be based upon the second printing, dated February 1989, of the Guides to the Evaluation of Permanent Impairment, third edition, published by the American Medical Association no evidence which was admitted into the record of this case demonstrates that the proper version of the Guides was not used. In addition, the Act provides that the opinion of the designated doctor with regard to MMI and impairment is entitled to presumptive weight unless the great weight of the other medical evidence is to the contrary. Articles 8308-4.25(b), 4.26(g). This panel has previously held that this requires more than a mere balancing of the evidence. *See* Texas Workers' Compensation Commission Appeal No. 92412, decided September 28, 1992. The hearing officer thus was required to consider and weigh all the medical evidence in the record in order to determine whether the designated doctor's opinion was overcome by the great weight of the other medical evidence in the record. Upon our review of the record, we find that her determination finds sufficient support. We accordingly affirm her determination on the issue of MMI.

The decision and order of the hearing officer are modified by striking the phrase, "or at any other time." In all other respects, the hearing officer's decision and order are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge